United States Court of Appeals for the Second Circuit



REPLY BRIEF

JJ5 74-2590

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARGARET M. LANDON,

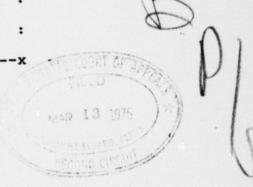
Plaintiff-Appellant,

No. 74-2590

v:

TWENTIETH CENTURY-FOX FILM CORPORATION and COLUMBIA BROADCASTING SYSTEM, INC.,

Defendants-Appellees.



REPLY BRIEF

of THE AUTHORS LEAGUE OF AMERICA, INC., as Amicus Curiae

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Plaintiff-Appellant,

No. 74 - 2590

:

V.

TWENTIETH CENTURY-FOX FILM CORPORATION and COLUMBIA BROADCASTING SYSTEM, INC.,

Defendants-Appellees. :

Reply Brief of The Authors League of America, Inc., as Amicus Curiae

In its brief <u>amicus curiae</u>, the Authors League argued that the District Court erred in dismissing Mrs. Landon's claim that the 1944 transfer to Fox* of rights under her 1971 renewal copyright was unenforceable under the antitrust laws, and under <u>Fisher v. Witmark</u>, 318 U.S. 643. (pp. 17-37).

Mrs. Landon's brief adopted the League's arguments on this point.

Point III of the defendants' brief addresses itself to the League's arguments on this issue. Since the League has briefed the issue, and will discuss it on oral argument, we respectfully request the Court's leave to reply to defendants' contentions on the issue. As we have noted this question is of grave concern to many other authors. And Mrs. Landon's reply brief adopts the arguments made herein.

^{*}Twentieth Century-Fox Film Corporation is referred to as "Fox"; Columbia Broadcasting System, Inc. as "Columbia."

The Unenforceability of the 1944 Assignment of Mrs. Landon's 1971 Renewal Copyright Interests Could Not be Determined by Summary Judgment

The allegations of Mrs. Landon's second Count bear on the infringement issue (Count I), as well as on her claim for damages under the Sherman Act. If the 1944 assignment of rights under her 1971 renewal copyright is unenforceable because imposed by an illegal tying arrangement, and/or because the circumstances were oppressive under Fisher v. Witmark, supra, then Fox had no right to produce or exhibit a television series based on her book during her renewal copyright term. Moreover, if the consideration for the 1944 assignment of 1971 renewal rights was inadequate, the assignment is unenforceable, with the same consequences.

For the reasons set forth in our main brief, we submit that factual issues exist concerning the enforceability of the 1944 assignment of renewal rights, on all of these grounds, and that these issues could not be resolved by summary judgment. We reply first to the Fox-Columbia arguments that there is no issue as to enforceability, then to their arguments on the statute of limitations.

(i) A "Buyer" Can Impose a Tying Transaction.

a tying transaction but offer no support for the claim. As many Supreme Court decisions indicate, buyers are prohibited

from price-fixing, refusals to deal and other practices barred to sellers by the Sherman Act. The point is emphasized in Mandeville Island Sugar Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236. A tying arrangement imposed by a "buyer" produces both of the consequences the antitrust laws seek to prevent. First, the party on whom it is imposed (the seller) is forced to abdicate her freedom to deal with others for the tied product (here, renewal copyright interests), and to deal with them when it is most advantageous to her -- i.e. in the "current market" for her rights, i.e. 1971 et seq. Second, the buyer imposing the arrangement (here, Fox) prevents its competitors from competing with it in the market for the tied product -- e.g., it forecloses other producers of television series from competing to acquire a production license under the 1971 renewal copyright, by compelling the assignment of those renewal rights as a condition for its acquisition of rights under the original copyright. cf. Northern Pac. Ry. Co. v. U.S. 356 U.S. 1,6.

(ii) "Actual Coercion" Existed.

Fox and Columbia contend that Mrs. Landon failed to prove "the exercise of actual coercion". But as their brief demonstrates, the nub of their argument (and the District Court opinion) is that her failure to protest the "tie-in" of the 1971 renewal interests in the 1944 transaction defeats her claim that their assignment is unenforceable. We disagree.

For the reasons set forth in our main brief (pp. 26-32), Fox did possess sufficient economic power in the marketplace for motion picture rights in books and plays to meet the test of Northern Pacific, supra and International Salt Co. v. United States, 332 U.S, 392. Fox applied that power Systematically to impose tying arrangements on authors with whom it dealt, requiring them to convey renewal rights as a condition for its purchase of rights under their original copyrights. Fox did not "merely" request these renewal assignments as a bargaining ploy; it required them as a standard condition, which was included in the contracts which it prepared -- just as the contracts and leases involved in Northern Pacific and International Salt contained tying clauses prepared by the defendants. Plaintiff is entitled to establish these circumstances at a trial; and certainly defendants did not adduce evidence which justified the District Court in foreclosing that trial.

(iii) Protest or Resistance Were Not Required

Fox and Columbia argue that an illegal tying arrangement could not have occurred because Mrs. Landon did not protest or resist the explicit provision of Fox's 1944 contract which required the tie-in assignment of her 1971 renewal rights. They claim that four franchise cases support their argument. (p.45) They do not. On the contrary, two of the opinions make it clear that defendants have confused two markedly distinct categories of tying cases.

[The other two are not even relevant to the issue here involved.]

In Abercrombie et al v. Lum, 345 F. Supp. 387, the Court pointed out that a tying arrangment could be established either

"(a) by proof of contractual obligations imposed in the franchise agreements, or(b) by proof that the franchisee was required through his dealings with the seller, extrinsic to any express agreement, to purchase an unwanted product." (at p. 390)

In Abercombie, the plaintiff relied on the latter ground -- "conduct extrinsic to (the) express agreement." The Court therefore held that a class action was not proper since a separate issue of fact would arise concerning "each franchisee's dealings with (the defendant)." As the court noted, the same conclusion was reached in Lah v. Shell Oil Co. 50 F.R.D. 198, where the plaintiff was required to proceed individually and not allowed to maintain a class action. In Kentucky Fried Chicken Corp v. Diversified Packaging Corp., 1974-2 CCH Trade Cases, Par. 75,422, the plaintiff failed to prove its allegations that the defendant-franchisor had used coercive pressure in its dealings with franchisees to compel them to accept tying arrangments which precluded them from buying supplies from plaintiff. [In the last franchise case cited by Fox and Columbia, the defendant prevailed on the ground that only a single product was involved; In Re 7-Eleven Franchise Antitrust Litigation, 1974-2 CCH Trade Cases, Par. 75, 429 .]

In American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F. 2d 272, this Court noted that:

"On its surface, it would appear that the contract does not reflect an illegal tie-in ... ABC's alleged coercion is said to have taken place during the extensive period of negotiations which culminated in the contract."

(388 F. 2d 276).

Here, Mrs. Landon did not allege that the tying arrangment was forced on her by coercive pressure "extrinsic to (the) express agreement" with Fox; she does not contend that Fox threatened to stifle the distribution of her book, or induce other producers not to deal with her, or apply other such "extrinsic" pressures. On the contrary, she contends that as in Northern Pacific and International Salt, defendant Fox imposed the tying arrangment (i) by an explicit clause in the 1944 agreement -- the tying assignment of the 1971 renewal interests; which (ii) she was compelled to accept because Fox possessed the coercive weapon involved in those cases. Here, as in Northern Pacific and International Salt, the "coercive" weapon consisted of the defendant's "power or leverage" in the market for the tying product; of his "control or dominance over the tying product so that it" constituted "an effecutal weapon" to compel the other party to accept a contract which contained defendant's clause tying in the tied product. Northern Pacific, supra (356 U.S. at p. 6).

Where a tying arrangment is imposed by an explicit provision in the agreement and defendant's sufficient economic power or market dominance, applied systematically to require tying arrangments in many contracts, the plaintiff is not required to have protested or resisted the imposition of the

Salt requires protest by the victims of the arrangment. Indeed, to require a protest or resistance in these circumstances is

"contrary to the congressional purpose that private ections serve 'as a bulwark of antitrust enforcement' perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 132, 139 (1968), and that the antitrust laws fully 'protect the victims of the forbidden practices as well as the public,' Radovich v. National Football League, 352 U.S. 445, 454 (1957)." Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 340.

For where the party which demands the tying arrangement posseses sufficient economic power and systematically requires that arrangement, it probably would refuse to make a contract with anyone who first protested or resisted and then "acquiesced" to the tie-in clause. It would be safer to avoid the potential of an antitrust suit, signalled by the protest or resistance, since feigned disagreement over other provisions offer pretexts for not proceeding. Thus, the District Court's erroneous ruling on protest offers the proposed target in a "Northern Pacific" situation -here Mrs. Landon -- two impossible alternatives: (i) protest, and lose the opportunity to buy or sell the tying product (here, to sell motion picture rights under her original copyright) or (ii) remain silent, to preserve that indispensable opportunity, and lose the right of redress under the antitrust laws. Neither Northern Pacific or International Salt requires that Mrs. Landon had to make that choice.

We respectfully submit that if Mrs. Landon can prove that Fox possessed "sufficient economic power" or market dominance

under Northern Pacific or International Salt, and that it systematically required tying arrangements in many of its contracts with authors, then she was not required to have protested or resisted the 1944 tying assignment of rights under her 1971 renewal copyright in order to sustain her claims that it is unenforceable and in violation of the antitrust laws. (ALA Br., pp. 23-25)

But even assuming a protest might otherwise be required, a factual issue still remains as to whether Mrs. Landon was entitled to refrain from protesting or resisting Fox's requirement that she tie-in the assignment of her 1971 renewal copyright interests, in the 1944 transaction. Under the circumstances involved here, we submit that she was not required to protest or resist, for two reasons, either of which is sufficient: first, because in view of Fox's power and systematic requirement for assignment of renewal interests, protest would have been jousting with windmills. American Mfg. Mut. Ins. Co v. American Broadcasting-Paramount Theatres, 388 F. 2d 272, 285; second, because in view of Fox's power and systematic contract practices, protest or resistance would have created the very real danger of losing Mrs. Landon's only opportunity of deriving income from the motion picture rights secured by her original copyright, the only rights that could be exercised during the first 28 years. (ALA Br., 30-32). These issues could only be resolved by a trial.

(iv) Factual Issues Remain as to "Oppressive Circumstances" and Inadequacy of Consideration

Aside from the Sherman Act, the question still remains

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whether Fox's exercise of its economic power to compel simultaneous assignments of rights under Mrs. Landon's original and renewal copyrights constituted "oppressive circumstances within the meaning of Fisher v. Witmark 318 U.S. 643, 656, which rendered the renewal assignment unenforceable. Mrs. Landon is entitled to have the trier of fact, at a trial, resolve the issue on all the relevant evidence and in light of the Supreme Court's finding that the very purpose of the renewal clause is to "enable(d) the author to sell his (original) 'copyright' without losing his renewal interest." -- the complete antithesis of a simultaneous assignment of original and renewal copyright interests. (318 U.S. at p. 654). Certainly, Fox and Columbia did not introduce evidence on the motion which justified the District Court's order foreclosing trial. Nor did they meet their burden of proving the "perfect fairness" of the renewal assignment. (See pp 12-13, infra).

Nor was the District Court justified in denying Mrs.

Landon a trial on the issue of inadequacy of consideration for the assignment of renewal rights. As this Court has held, inadequacy of consideration would preclude the assignment from being enforced. Rossiter v. Vogel, 134 F. 2d 908. For the reasons indicated in our main brief, there is a substantial issue of fact as to the inadequacy of consideration (pp.29-30).

Fox and Columbia did not present evidence sufficient to warrant summary judgment on this issue. Indeed, they did not meet their burden of proving that "full and adequate consideration "was paid. (see pp 12-13, infra).

The Statute of Limitations Does Not Bar a Determination That the 1944 Assignment of Renewal Rights is Unenforceable

Defendants contend that Mrs. Landon's claim for damages caused by the tying arrangement is barred by the four-year antitrust action statute of limitations [15 U.S.C.(b)]. However, Fox and Columbia do not address themselves to the other aspects of Mrs. Landon's claim concerning the invalidity of the renewal assignment. If the assignment is unenforceable as a violation of the tying prohibition, or because it was produced by "oppressive circumstances", or for inadequacy of consideration — then Fox and Columbia are liable for infringing Mrs. Landon's rights under her 1971 renewal copyright, regardless of what rights Fox acquired under the original copyright. (ALA Br. pp. 18, 34) Even assuming the claim for antitrust damages is barred by limitations (and we submit it was not), no statute of limitations bars Mrs. Landon from seeking and obtaining a determination that the 1944 renewal assignment is unenforceable.

(i) No Statute of Limitations Bars Mrs. Landon From Replying to Defendants' Efforts to Establish The Validity of the 1944 Renewal Assignment

In Count I, Mrs. Landon sues for infringement of her renewal copyright, which she alone was entitled to secure (17 U.S.C. 24). To avoid liability for infringement, Fox and Columbia must establish that they acquired enforceable rights under her 1971 renewal to produce and exhibit the television

series based on her novel. Thus, Fox and Columbia have pleaded, as a (SIXTH) affirmative defense, that the production and exhibition of the series was done pursuant to rights granted to them under the 1944 renewal assignment. have thus affirmatively asserted, as they must, the validity of the assignment. And Mrs. Landon is not barred, by any statute or limitations, from contesting the enforceability of the 1944 renewal assignment -- in reply to the affirmative defense that it is valid and enforceable. It is axiomatic that statutes of limitations do not bar claims made as defenses. Luckenbach Steamship Co., Inc. v. United States of America, 312 F.2d 545 (2d Cir. 1963); Heck v. Rodgers, 457 F.2d 303 (7th Cir. 1972); In Re Seaman's Will, 275 App. Div. 484; aff'd 300 N.Y. 756. Certainly, the statute cannot bar a plaintiff from contesting the validity of an assignment of her rights, in reply to a defense that the assignment bars her action for infringement.

It is clear that if the assignment were determined to be unenforceable -- for invalidity under the Sherman Act, oppressive circumstances, or inadequacy of consideration -- it would not constitute a defense to Mrs. Landon's infringement claim. In Snyder v. Rosenbaum, 215 U.S. 261 (1909), plaintiff sued for breach of a 1909 contract; defendant asserted the suit was barred by a 1900 agreement; and plaintiff replied that the defendant had imposed the 1900 agreement on him by duress. The Court affirmed a judgment for the plaintiff. Significantly, Snyder v. Rosenbaum was cited by this Court in Witmark v Fisher,

in support of its conclusion that when first-term assignments of renewal interests were "made under oppressive circumstances", such assignments "should be denied enforcement by the courts."

318 U.S. p. 656.

Even had defendants not pleaded the 1944 renewal assignment as an affirmative defense, they would be obliged to establish its "fairness" and the adequacy of consideration paid for it, thus raising the issue of enforceablity — to which plaintiff must be permitted to reply. As this Court held in Rossiter v. Vogel et. al, 134 F. 2d 908, the 1944 assignment of rights under Mrs. Landon's 1971 renewal copyright was an assignment of an expectancy." (at p.911) Consequently, the assignee must not only prove the assignment, as the general rule requires [6 C.J.S.2d ASSIGNMENTS Sec. 140]. The assignee, Fox, must also prove "that its title is such as would be supported by a court of equity." Rose v. Bourne, Inc., 176 F. Supp. 605,611; aff'd 279 F.2d 79; cert. den 364 U.S. 880.

In Rose v. Bourne, the Court indicated that the publisher-assignee of renewal rights is subject to the burden of proof imposed on one who acquires an "expectancy", a " present assignment of a future right"; the Court applied the test laid down in Pomeroy, declaring:

[&]quot;Pomeroy on Equity Jurisprudence, 5th Ed., Sec. 953a, p. 783, says that the burden rests upon the purchaser to show the perfect fairness of the contract and that a full and adequate consideration was paid." 176 F. Supp at p. 611.

Since Fox and Columbia must establish the "perfect fairness" of the renewal assignment on which they rely, and the adequacy of consideration paid for it, plaintiff obviously cannot be barred by any statute of limitations from demonstrating, in reply to their attempt to sustain this burden, that (i) the 1944 renewal assignment was not fair because it was imposed by a tying arrangement and resulted from "oppressive circumstances" and (ii) was not supported by "full and adequate consideration."

(ii) No Statute of Limitations Bars Mrs. Landon's Claim For a Declaration that the Assignment is Unenforceable

Mrs. Landon also seeks affirmatively to establish that the 1944 assignment of rights under her 1971 renewal copyright is unenforceable, and therefore not available to defendants as a defense against her claim for infringement. Even if this claim were barred by limitations, she would be entitled to contest the validity of the assignment, for the reasons set forth in (i) above. However, the statute of limitations does not bar her affirmative plea for a determination of unenforce bility. It is well established that an author may challenge the validity of a first-term assignment of renewal rights after the renewal copyright has been secured, even though the assignment was executed one or two decades before, or prior to the securing of the original copyright. Fisher v. Witmark, supra; Rossiter v. Vogel, supra; Rose v. Bourne, supra; Carmichael v. Mills Music, Inc. 121 F. Supp. 43.

As noted in <u>Carmichael</u>, technically such a suit should be commenced after the renewal copyright is secured by the author, since his prior death would make the question hypothetical. However, in <u>Carmichael</u>, a controversey had already developed between an author and publisher over several old renewal assignments, 3 for renewals already secured and eleven for renewal copyrights to mature within a seven year period. The Court therefore permitted the action to proceed. Here, the renewal copyright was not secured until 1971; and the controversey between Mrs. Landon and Fox as to their rights in the renewal interests involved did not erupt until that year. Thus, this suit was commenced well within the applicable period of limitations.

(iii) The Four-Year Statute of Limitations Did Not
Bar Mrs. Landon's Claim for Damages under the
Antitrust Laws

The District Court rejected Mrs. Landon's contention
that the four year statute [15 U.S.C.16(b)] did not bar
her claim for damages under the antitrust law because she
could not prove those damages with reasonable certainty until
a time well within four years from the commencement of the suit.

Zenith Radio Corporation v. Hazeltine Research, Inc., 401 U.S.

321; Poster Exchange, Inc. v. National Screen Service Corp. 456 F.2d
666-7; Continental-Wirt Electronics Corp. v. Lancaster Glass Corp.,
459 F. 2d 768.

Defendants contend that plaintiff could have proved her damages with reasonable certainty more than four years

before this suit was commenced. But that is mere assertion, which does not dispose of the factual issues involved. There was no testimony before the District Court as to a market for the sale of "renewal expectancies", as separate properties, 27 years before they matured. There was no evidence that experts could determine the profits which a renewal copyright might earn 27 or more years in the future, on which to base an opinion as to value.

It is, of course, well known that damages for the destruction of rights in a literary work, by infringement or misappropriation, are difficult to ascertain with reasonable certainty. Brady v. Daly, 175 U.S. 148, 154; F.W. Woolworth & Co. v. Contemporary Arts, Inc. 344 U.S. 228, That is why statutory damages are allowed, and why the successful plaintiff is entitled to recover the infringer's profits.

In computing damages in an antitrust suit, a plaintiff is entitled to introduce such evidence as a comparison of its earnings before and after the proscribed antitrust conduct occurred. Bigelow v. RKO Pictures, 327 U.S. 251 (cited by defendants).

Here Mrs. Landon could not have introduced evidence in 1948 or, 1958 of the potential earnings from renewal rights that would not come into being until 1971. The very purpose of the renewal copyright was to enable the author to obtain the economic benefits that might accrue from her work during the second copyright term.

Fisher v. Witmark, 318 U.S. 653-654. Consequently, if the renewal rights are taken from her through a violation of the

antitrust laws early in the first copyright term, the purpose of the renewal section and the antitrust laws are frustrated if the author is relegated to recovering the lesser value of her expectancy 27 or 26 years before it matured — asssuming, as has not been established here, that even that "value" could be proven. The feasibility of proving ascertainable damages prior to the inception of the renewal term, and the point at which that might have been done, is but one of the many factual issues which the District Court should not have foreclosed by granting summary judgment.

CONCLUSION

The order granting summary judgment dismissing the complaint should be reversed.

Respectfully submitted,

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